No. 18-302

In the
Supreme Court of the United States

ANDREI IANCU, UNDER SECRETARY OF COMMERCE,

Petitioner,

v.

ERIK BRUNETTI,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF AMICUS CURIAE KURT M. ANDERSON IN SUPPORT OF PETITIONER'S REQUEST FOR REVERSAL

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Pro se

QUESTIONS PRESENTED

Presented by the Petitioner: Whether 15 U.S.C. § 1052(a)'s prohibition on the federal registration of "immoral" or "scandalous" marks is facially invalid under the Free Speech Clause of the First Amendment.

Additional Question Addressed: Whether the Free Speech Clause of the First Amendment mandates the recognition of proprietary rights in speech.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iii
IDENTITY AND INTEREST OF AMICUS CURIAE 1
SUMMARY OF ARGUMENT 3
ARGUMENT 5
I. THE FIRST AMENDMENT DOES NOT MANDATE INTELLECTUAL PROPERTY RIGHTS IN SINGLE-WORD "VIEWPOINTS" 5
II. DENIAL OF INTELLECTUAL PROPERTY RIGHTS DOES NOT UNCONSTITUTIONALLY CHILL SPEECH 6
III ADMINISTRATIVE LAW (AND IF NECESSARY, EQUAL PROTECTION) STANDARDS ARE SUFFICIENT TO PREVENT UNFAIR APPLICATION OF 15 U.S.C. § 1052 8
IV. IF NECESSARY, THE COURT SHOULD OVERRULE *MATAL V. TAM* 10
CONCLUSION 11

TABLE OF AUTHORITIES

Cases

Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656 (2004) 6
Bartnicki v. Vopper, 532 U.S. 514 (2001) 5, 6
Dickinson v. Zurko, 527 U.S. 150 (1999) 8
Eldred v. Ashcroft, 537 U.S. 186 (2003) 10
In re Brunetti, 877 F.3d 1330 (Fed. Cir. 2017) 8, 9
In re McGinley, 660 F.2d 481 (C.C.P.A. 1981) 4, 8, 10, 12
In re Tam, 808 F.3d 1321 (Fed. Cir. 2015), *aff'd sub nom. Matal v. Tam*, __ U.S. ____, 137 S. Ct. 1744 (2017) 4, 6, 9
Matal v. Tam, ___ U.S. ____, 137 S. Ct. 1744 (2017) 4, 9, 10, 11
Payne v. Tennessee, 501 U.S. 808 (1991) 11
Smith v. Allwright, 321 U.S. 649 (1944) 11
Weinberger v. Wiesenfeld, 420 U.S. 636 (1975) 9
Younger v. Harris, 401 U.S. 37 (1971) 7

Constitutional Provisions

U.S. Const. Art. 1, Section 8, Clause 3 (Commerce clause) 3
U.S. Const. Art. I, Section 8, Clause 8 (Copyright Clause) 3
U.S. Const. Fifth Amendment (Equal Protection). 4, 9
U.S. Const. First Amendment . i, 3, 4, 5, 7, 8, 9, 10, 11

Statutes

15 U.S.C. § 1052(a) ..... i, 8, 9
5 U.S.C. § 706 8

Other Authorities

https://www.mytutor.co.uk/answers/8603/A-Level/Psychology/What-is-the-difference-

between-reinforcement-and-punishment-in-operant-conditioning 7

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Kurt M. Anderson (for purposes of this statement only, "I") respectfully submits this brief amicus curiae in support of Petitioner Andrei Iancu. [1]

I have been admitted to practice before this Court for three decades. Like other citizens of the United States, I have also followed political developments throughout my lifetime, which for me covers parts of seven decades.

I am increasingly concerned that our political processes have been preempted from all directions with newly discovered applications of constitutional law. One may complain in relatively mild terms that our democracy is beginning to resemble a half-eaten apple, with the associated colors of decay as one faction or another (or in the present case, possibly all factions) takes a bite out of it. As citizens are denied their normal processes for resolving their political

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae made a monetary contribution to its preparation or submission.

differences, polarization and instability are increasingly evident.

I write this brief to plead for renewed respect for majoritarian democracy; and to uphold the power of the people, through their elected representatives, to set qualitative standards when granting intellectual property rights.

I do not request to participate in oral argument. I will not appear for oral argument unless directed to do so by the Court.

SUMMARY OF ARGUMENT

The First Amendment nurtures the marketplace of ideas that allows us to continuously regenerate our political and national culture. However, the resulting cultural fungi do not have equal value. The Constitution empowers us – through our elected representatives – to make distinctions among them while requiring us to tolerate the differences. The First Amendment is not a branch of the land patent office; its beneficiaries are entitled to toleration of their speech, but not to homestead an acre for it.

The copyright clause stands alongside the First Amendment, and it empowers Congress to "promote the progress of science and *useful* arts," U.S. Const. Art. I, Section 8, clause 8 (emphasis added), by granting proprietary rights in some speech or expression while denying it in others. Clause 3, the commerce clause, broadly empowers Congress to "regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Under the latter clause, Congress has enacted the trademark law at issue in this case.

The interaction between the First Amendment and the intellectual property statutes was best expressed by Federal Circuit precedent that now, unfortunately, appears to be overruled:

> With respect to appellant's First Amendment rights, it is clear that the PTO's refusal to

> register appellant's mark does not affect his right to use it. No conduct is proscribed, and no tangible form of expression is suppressed. Consequently, appellant's First Amendment rights would not be abridged by the refusal to register his mark.

In re McGinley, 660 F.2d 481, 484 (C.C.P.A. 1981), *abrogated by In re Tam*, 808 F.3d 1321 (Fed. Cir. 2015), *aff'd sub nom. Matal v. Tam*, 137 S. Ct. 1744 (2017) (citation omitted).

Well-established principles of administrative or equal protection law are sufficient to guard against unfair classifications and denials of intellectual property rights. Resort to the First Amendment, if ever, should be rare.

The Court should reinstate the *McGinley* holding, if necessary overruling *Matal v. Tam*.

Because Respondent's claim does not reach a First Amendment threshold, there is no governmental or commercial speech issue in this case.

ARGUMENT

I. THE FIRST AMENDMENT DOES NOT MANDATE INTELLECTUAL PROPERTY RIGHTS IN SINGLE-WORD "VIEWPOINTS"

A single word, with or without an article, expresses no viewpoint. Even the most colorful four-letter interjections require reference to a situation or context in order to give them meaning.

A person complaining of viewpoint discrimination in trademarks or copyrights should have the threshold burden of demonstrating the expression of a viewpoint, without reference to context. Typically, expression of a viewpoint requires at least two parts of speech, in the present case pairing an adjective or verb with the noun in question. According to the Respondent, exactly who or what is, was, or might be fuct?

On the other hand, a single word may generate a nearly infinite array of viewpoints. Making that word the private property of a trademark or copyright holder gives that holder control over the key term of the discussion. Giving the Respondent exclusive rights in the word "Fuct" may also give him the power to prohibit more explicit rejoinders such as as "Fashion is Fuct" or "These T-Shirts are Fuct." In this regard, it is worth considering the "balance between [the] speech-restricting and speech-enhancing consequences" of the Respondent's First Amendment claim. *Bartnicki v. Vopper*, 532 U.S. 514, 536 (2001)

(Breyer, J., concurring). In this case, the balance tips toward denying the property rights, and Congress was empowered to do so. The proper result is no regulation at all of the speech in issue.

II. DENIAL OF INTELLECTUAL PROPERTY RIGHTS DOES NOT UNCONSTITUTIONALLY CHILL SPEECH

If a law does not "condemn as criminal any category of speech, ... the potential chilling effect is eliminated, or at least much diminished." *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 667 (2004). Denial of intellectual property rights is not "extraordinary harm," *id.* at 671, that unconstitutionally chills speech. A decision not to register the asserted trademark is a decision not to regulate the speech.

Beyond the threat of criminal prosecution, such "extraordinary harm" exists only in limited situations. *See, e.g., Bartnicki v. Vopper, supra* at 533 ("the fear of public disclosure of private conversations might well have a chilling effect on private speech"). The "serious disincentive" the Federal Circuit enunciated in *In re Tam, supra* at 1341, was not previously deemed so extraordinary as to unconstitutionally chill speech. [2]

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[2] Some observers also may object to the equation of a denied incentive (in social science terms, a form of reinforcement) with a punishment or penalty. *E.g., https://www.mytutor.co.uk/answers/8603/A-*

> Moreover, the existence of a 'chilling effect,' even in the area of First Amendment rights, has never been considered a sufficient basis, in and of itself, for prohibiting state action. Where a statute does not directly abridge free speech, but—while regulating a subject within the State's power—tends to have the incidental effect of inhibiting First Amendment rights, it is well settled that the statute can be upheld if the effect on speech is minor in relation to the need for control of the conduct and the lack of alternative means for doing so.

Younger v. Harris, 401 U.S. 37, 51 (1971) (citations omitted). As far as the record indicates, both the Respondent's fashion line and Mr. Tam's dance band enjoyed a large degree of commercial success without having exclusive and privileged rights in any form of speech. A music group or fashion line organized by the Ku Klux Klan, using another imaginative but generally offensive name, might also achieve a significant degree of success without that privileged status.

On the other side of the scale, the seven core articles of our Constitution are not a mere plumbing schematic – and if they were, it nevertheless would be vital to follow the schematic. Our founders spent several hot summer months working out optimal

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Level/Psychology/What-is-the-difference-between-reinforcement-and-punishment-in-operant-conditioning (last visited February 12, 2019).

relationships between the federal and state governments, and between the branches of the federal government, in order to create a durable democracy. In the copyright clause, they expressly empowered Congress to make qualitative judgments when granting exclusive rights in creative expression. There is no reason to conclude that they intended less when they prescribed Congress's power to regulate commerce. The government has a legitimate interest in denying property rights in speech that falls short of its qualitative standards.

In short *McGinley*, quoted *supra*, correctly expressed the relationship between freedom of speech and intellectual property law. The First Amendment does not mandate the registration of the Respondent's asserted trademark.

III ADMINISTRATIVE LAW (AND IF NECESSARY, EQUAL PROTECTION) STANDARDS ARE SUFFICIENT TO PREVENT UNFAIR APPLICATION OF 15 U.S.C. § 1052

The Administrative Procedure Act's standards of judicial review, 5 U.S.C. § 706, fully apply to USPTO proceedings. *Dickinson v. Zurko*, 527 U.S. 150 (1999). In the decision now under review, the Federal Circuit acknowledged its authority to review the USPTO's fact finding under a substantial evidence standard, and its ultimate conclusion *de novo*. *In re Brunetti*, 877 F.3d 1330, 1337 (Fed. Cir. 2017). The Circuit concluded that the "scandalous"

criterion was correctly applied in this case, before commencing its constitutional analysis.[3] *Id.* at 1337–40. [4] There was nothing insufficient in the administrative and APA judicial review process in this case.

If one recognizes the constitutional authority of Congress to make qualitative distinctions in the realm of intellectual property law, then the burden falls on the applicant to challenge those distinctions on constitutional grounds outside of First Amendment jurisprudence. As against the federal government, the right to equal protection is secured by the Fifth Amendment. *See, e.g., Weinberger v. Wiesenfeld*, 420 U.S. 636, 643 (1975). A party such as the Respondent could assert that his form of expression cannot be classified differently from the name or form of expression found in the New York Times or the National Review. A *prima facie* rebuttal to that assertion would not be difficult to make, but the outcome would have to await that case and day. The Court has a well-developed framework for addressing equal protection issues.

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[3] As the Federal Circuit concurrence noted in *In re Tam*, the majority of that court did not rely on vagueness as an independent ground for invalidating a portion of § 1052. 808 F.3d at 1358. In the decision below, the Circuit criticized the apparent vagueness of the "immoral" and "scandalous" standards, but apparently that only affected its analysis of the commercial speech issue the government raised. *In re Brunetti*, *supra* at 1354–55.

[4] Without enunciating a standard of review, this Court came to a similar result in *Matal v. Tam*. 137 S.Ct. at 1755-57.

IV. IF NECESSARY, THE COURT SHOULD OVERRULE *MATAL V. TAM*

In addition to challenging the Federal Circuit decision now under review, the arguments in this brief challenge the rationale of this Court's *Matal v. Tam* precedent. If necessary for the decision of the present case, the Court should overrule that precedent.

Matal v. Tam assumed contrary to *McGinley, supra,* that there was a presumptive First Amendment right at issue. Its analysis commenced with the incorrect factual premise that some speech had been "banned." 137 S. Ct. at 1751; *see also id.* at 1769 (Thomas, J, characterizing the speech as having been "restricted"). It then considered and rejected three technical reasons why the presumptive right should not apply in that case. *Id.* at 1757 et seq.

None of the *Matal v. Tam* opinions addressed Congress' power to make qualitative judgments in granting intellectual property rights. *Cf. Eldred v. Ashcroft*, 537 U.S. 186, 190 (2003):

> The Copyright Clause ... empowers Congress to *define* the scope of the substantive right. Judicial deference to such congressional definition is but a corollary to the grant to Congress of any Article I power.

(Emphasis in original; citations and internal quotes omitted).

"[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" *Payne v. Tennessee*, 501 U.S. 808, 827 (1991), *quoting Smith v. Allwright*, 321 U.S. 649, 665 (1944). In addition to *Matal v. Tam*'s misstatements that speech had been prohibited or restricted, it opens the door to a new form of land rush. It also allows purveyors of cultural miscellany (to charitably state the case) to compel our citizenry to bow before new pedestals of offensively labeled property rights. The precedent is less than two years old, and overruling it would nip these unfortunate effects in the bud.

CONCLUSION

The Court should uphold the statute, instead of creating another carve-out from democratic lawmaking processes. However, regardless of whether this Court applies a renewed majoritarian approach to the present issue, no speech has been banned, restricted, or chilled in this case. The constitution empowers Congress to make qualitative judgments in granting intellectual property rights. The First Amendment contains no guaranty of property rights in speech or expression.

Therefore, the Court should reverse the judgment of the Federal Circuit and reinstate

McGinley doctrine, thus affirming the decision of the U.S. Patent and Trademark Office.

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Respectfully submitted,

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